Office - Supreme Court, U.S.
FILED
DEC 4 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957:

No. 639

ROY D. HONEYCUTT,
Petitioner,

vs.

WABASH RAILWAY COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ST. LOUIS COURT OF APPEALS OF THE STATE OF MISSOURI.

CHARLES E. GRAY,
Suite 701—721 Olive Street,
St. Louis 1, Missouri,
CHestnut 1-5620,

TERRY, JONES & WELTON,
210 Rialto Building,
Kansas City, Missouri,
Attorneys for Plaintiff.

INDEX

Opinions 2
Jurisdictions 2
Questions Presented 2
Statute Involved 4
Statement of Facts 4
Reasons Relied On for the Allowance of the Writ 10
Conclusion 19
Appendix A, Federal Employers' Liability Act, 53 Statutes 1404-1414, 45 U. S. C., Sections 51-60, inclusive A1
Appendix B, Order of the Missouri Supreme Court denying respondent's petition to transfer cause A6
Appendix C, Order of the St. Louis Court of Appeals reversing judgment and the opinion of the St. Louis Court of Appeals A7

Table of Authorities

CASES

Arnold v. *Panhandle & S. F. Ry. Co.*, 353 U. S. 360, 77 S. Ct. 840, 1 L. Ed. 889 ..... 15, 16
Deen v. *Gulf, C. & S. F. Ry. Co.*, 353 U. S. 925, 77 S. Ct. 715, 1 L. Ed. 2d 721 ..... 15, 16
Ferguson v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511 ..... 13, 15, 16
Futrelle v. *Atlantic Coast Line R. Co.*, 353 U. S. 920, 77 S. Ct. 682, 1 L. Ed. 2d 718 ..... 15, 16
Gibson v. *Guy A. Thompson, Trustee, New Orleans, Texas & Mexico Railway Co.*, 54 U. S. ....., 78 S. Ct. 2, 26 Law Week. 3128 ..... 15, 16
Lavender v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740 ..... 15, 16
Pittsburgh C. C. & L. R. Co. v. *Cole*, 6th Cir., 260 Fed. 357 16

Ringhiser v. *Chesapeake & O. Ry. Co.*, 354 U. S. 901, 77 S. Ct. 1093, 1 L. Ed. 2d 1268 ..... 15, 16
Rogers v. *Missouri Pacific R. Co.*, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 ..... 10, 15, 16, 19
Shaw v. *Atlantic Coast Line R. Co.*, 353 U. S. 920, 77 S. Ct. 680, 1 L. Ed. 2d 718 ..... 15, 16
Tennant v. *Peoria & Pekin P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 18-19
Texas & Pacific R. Co. v. *Behymer*, 189 U. S. 469, 23 S. Ct. 622, 47 L. Ed. 905, 906 15
Thomson v. *Texas & Pacific Ry. Co.*, 353 U. S. 926, 77 S. Ct. 698, 1 L. Ed. 2d 722 ..... 15, 16
Urie v. *Thompson*, 337 U. S. 163, 69 S. Ct. 1018, 1028, 93 L. Ed. 1282 ..... 14, 15, 16
Urie v. *Thompson*, 357 Mo. 731, 210 S. W. 2d 98 14
Webb v. *Illinois Central R. Co.*, 352 U. S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503 ..... 15, 16

STATUTES

28 U. S. C., Sec. 1257 (3) 2
Title 45, Federal Employers' Liability Act, 53 Stat. 1404, 45 U. S. C., Sec. 51 et seq. 2, 4, 5, 10
Title 41, Jones Act; 41 Stat. 10007, 46 U. S. C., Sec. 688 .. 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. .....

ROY D. HONEYCUTT,
Petitioner,

vs.

WABASH RAILWAY COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ST. LOUIS COURT OF APPEALS OF THE STATE OF MISSOURI.

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Roy D. Honeycutt, prays that a writ of certiorari issue to review the judgment of the St. Louis Court of Appeals, State of Missouri, entered in the above-entitled cause on June 4, 1957.

OPINIONS.

The opinion of the St. Louis Court of Appeals has been reported in *Honeycutt* v. *Wabash Railway Co.*, Mo. App., 303 S.W.2d 153.

The order of the Missouri Supreme Court denying respondent's application to transfer cause is not reported but is printed in appendix (App. B, p. 21, R. 263).

JURISDICTION.

The judgment of the St. Louis Court of Appeals was entered on June 4, 1957; a motion for a rehearing in that Court, or in the alternative to transfer cause to the Supreme Court of Missouri was overruled by the St. Louis Court of Appeals on July 1, 1957; and petitioner's application to transfer to the Supreme Court of Missouri was denied by that Court on September 9, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED.

It being admitted by the pleadings (R. 4) that the petitioner's duties as an employee of the respondent were in furtherance of interstate commerce transportation business of the respondent and that by reason thereof, the petitioner and the respondent were at all times engaged in interstate commerce and were subject to the Federal Employers' Liability Act, 45 U.S. Code, Sec. 51-60, the questions presented for review are:

1. The petitioner was using a rivet gun furnished him by the defendant and was working underneath

a boxcar when the rivet gun was accidentally discharged causing petitioner to be struck by the snap of said gun. Until shortly before petitioner sustained injuries, respondent furnished its employees at the shop where petitioner worked with rivet guns with inside triggers. When one of these guns broke down, respondent furnished a replacement with an outside trigger. Petitioner, only after objection, used this gun. The evidence showed that the gun with the outside trigger was not protected and it was one that could be very easily discharged, whereas the other guns were so designed that the trigger was on the inside of the handle where it couldn't accidentally be hit against something. The gun with the unprotected trigger was described by employees as "unsafe". Petitioner was required to use said gun while working underneath a boxcar which had been raised only four feet. In the trial court the issue submitted to the jury was whether respondent was negligent in requiring petitioner to use said gun under the circumstances. After a jury verdict in favor of your petitioner, on appeal to the St. Louis Court of Appeals, the St. Louis Court of Appeals reversed the judgment in favor of your petitioner and held that no submissible issue for the jury was presented. The question thus presented is whether your petitioner was entitled to have the negligence of the respondent passed upon by a jury.

2. Petitioner's evidence showed that up until shortly prior to being injured the only type of guns furnished at the shop where petitioner worked were guns with the inside trigger and that it was only a few days before he was injured that the gun with the unprotected trigger was furnished. Respondent introduced some evidence showing that the gun with the outside trigger was in common usage. The St. Louis Court of Appeals held that since the evidence showed that the gun with the outside trigger was in common usage that respondent would, as a matter of law, be absolved from liability. The question thus

presented is: May the respondent shield itself from liability merely by furnishing instruments in common usage even though the evidence shows that such equipment is an unsafe piece of equipment.

3. Did the St. Louis Court of Appeals invade the province of the jury by accepting as true respondent's evidence concerning the common usage of the rivet gun with an unprotected trigger, even though petitioner's evidence showed that at this shop rivet guns with inside triggers had been furnished until only shortly prior to petitioner's sustaining injury, and, by further ruling as a matter of law that the working conditions presented no unusual situation even though petitioner's evidence showed that the gun furnished was one with an unprotected trigger, that the gun had no safety mechanisms and could be very easily tripped, that petitioner was required to work and move about under a boxcar that had been raised only four feet and that the gun which he was required to work with could not be turned off while he was under the boxcar.

STATUTE INVOLVED.

The pertinent provisions of Title 45, Federal Employers' Liability Act 53, Sections 1404 *et seq.*, 45 U.S.C., Section 51, *et seq.*, are printed in Appendix A, *infra*, p. A1.

STATEMENT OF FACTS.

The Federal question involved in the instant case is the interpretation of the Federal Employers' Liability Act (45 U.S. Code, Sec. 51, *et seq.*), which was first raised by petitioner upon the filing of his petition in the Circuit Court of the City of St. Louis, Missouri (R. 1-3), and this question was raised in the trial court by petitioner's plead-

ings (R. 1-3) and also by his charge to the jury (R. 147). The St. Louis Court of Appeals in its decision denied the petitioner of rights under said Federal Employers' Liability Act (R. 14) and said St. Louis Court of Appeals refused to review its action upon motion for rehearing filed by petitioner and the Supreme Court of Missouri failed and refused to review rights of petitioner under the Federal Employers' Liability Act by denying petitioner's motion to transfer to that Court.

Petitioner, Roy Honeycutt, brought this action under the provisions of the Federal Employers' Liability Act (45 U.S.C.A., Sec. 51, *et seq.*), alleging that the respondent operated a railroad in interstate commerce (R. 1); that petitioner was employed by respondent as a carman in respondent's railroad yards in the City of North Kansas City, Missouri, and that the duties of petitioner were in furtherance of interstate commerce. Petitioner in his petition alleged that he received injuries while in the employment of the respondent as a result of the negligence of respondent in failing to furnish petitioner with a reasonably safe place to work and reasonably safe tools to work with in that respondent provided petitioner a rivet gun to use which had an unprotected trigger, when, in the exercise of care, respondent knew, or should have known, that in the use of said equipment in the performance of his duty, petitioner was likely to be injured (R. 1-3). In the respondent's answer filed, the respondent admitted the allegations concerning petitioner's employment by respondent, admitted respondent operated a railroad in interstate commerce, and admitted that respondent furnished petitioner with a rivet gun, but essentially denied the other allegations contained in petitioner's petition (R. 3-4).

Upon trial in the Circuit Court in the City of St. Louis, State of Missouri, the following facts were established:

Petitioner received his injuries on October 10, 1954, when he was riveting cover plates on a body bolster of a boxcar (R. 39). The body bolsters are located underneath the car and run across the width of the car (R. 27). Petitioner had three or four feet under the body bolster to move and he was working directly under the body bolster, which was six inches to one foot above his head, and riveting with the rivet gun above his head (R. 49-55). He had finished riveting the north side of the car and was preparing to move to the other side of the car, and as he did so, he picked up the rivet gun from his lap and the gun discharged (R. 41-42). The rivet gun was discharged when the trigger brushed against something, probably the apron petitioner was wearing (R. 52).

When the gun discharged, the snap from the rivet gun hit the sill of the car and glanced back and hit the petitioner (R. 52). When the trigger on a rivet gun is pressed, air is forced into the chamber which works up and down causing the snap to strike the rivet (R. 9). When the snap doesn't hit anything, the snap and the plunger will fly out of the rivet gun (R. 9). Petitioner was wearing plastic safety glasses and also eye glasses and when he was hit by the snap from the rivet gun, the safety glasses and eye glasses he was wearing were shattered and he received the injury for which he brought suit in this case (R. 46).

At the time of trial, petitioner was 36 years of age and had been using rivet guns for about four years (R. 55).

Two types of rivet guns were described in evidence and were demonstrated to the jury. One type of rivet gun (Plaintiff's Exhibit A (R. 8)); and Plaintiff's Exhibit B (R. 10), has a trigger on the outside, and one type has the trigger located on the inside of the handle (Defend-

ant's Exhibit 1 (R. 115, 23)). The rivet gun with the trigger on the outside does not have a trigger safety on it or anything to keep the gun from going off when not in use (R. 43). The rivet gun with the trigger on the inside has the trigger surrounded and you couldn't accidentally hit it against something when the gun was moved; whereas the rivet gun with the trigger on the outside is not protected by any mechanism (R. 69-70). The evidence showed that it was necessary that riveting be done underneath cars (R. 70) and that there is a reasonable likelihood for the type of riveting gun with the trigger on the outside of the handle, to discharge when working underneath a car (R. 72).

Petitioner had gone to the foreman's office on the day of his injury where the rivet guns were kept in a cabinet and he chose a rivet gun with the inside trigger, but he was told that he would have to use the gun with the outside trigger (R. 40). The inside trigger gun was inoperative and needed to be sent to Decatur, Illinois, for repairs (R. 115, 116). Petitioner took the outside trigger gun to use in his work (R. 41). He had used this gun only once before, which was the previous day (R. 39).

Petitioner produced a witness who was working with the petitioner when he was injured, and who had been employed by the respondent for a total of nine years (R. 7-20). This witness testified that the first time he had seen a rivet gun with the outside trigger was the day before petitioner was injured (R. 13, 18). Prior to that time rivet guns with an inside protected trigger had been used (R. 13). The same rivet gun had discharged the previous day when this witness was using the gun and had picked up the gun to drive a rivet (R. 16). Not much force is required to set the gun off, and it can be discharged by a slight brush (R. 15). The witness had com-

plained that the gun was trigger happy to his foreman the day it discharged accidentally when he was using it (R. 19, 28). The rivet gun operates on ninety pounds air-pressure, and discharges with terrific force (R. 16, 17). He stated the gun with the unprotected trigger was unsafe (R. 29, 33). There is no safety latch on the gun, and the air power can only be disconnected by walking to the cut-off valve which is not done when the men move from car to car with the rivet gun (R. 34).

Respondent introduced evidence that there is a general preference in industry generally for the type of gun with the trigger on the outside (R. 42). The Santa Fe, Missouri Pacific, Wabash, and Southwestern Railroad Companies use more outside trigger guns than inside trigger guns and the ratio in sales of the outside trigger guns to inside trigger guns is two to one (R. 42). The respondent's evidence also showed that for two years prior to the accident one of the guns had an inside trigger and the other had an outside trigger (R. 116, 117), but this is contrary to petitioner's evidence, and the Appellate Court was required to adopt petitioner's evidence as true.

The Circuit Court of the City of St. Louis, State of Missouri, allowed the case to go to the jury and a verdict in favor of the petitioner in the amount of $11,500.00 was returned on April 3, 1956 (R. 167). Thereafter, on July 2, 1956, the Circuit Court overruled respondent's motion for a new trial on condition that petitioner remit the sum of $7,000.00 (R. 171-173).

On July 11, 1956, petitioner filed a remittitur in the amount of $7,000.00 (R. 173).

On July 18, 1956, the respondent filed its Notice of Appeal in the Circuit Court (R. 174). Briefs were submitted and the case was argued in the St. Louis Court of

Appeals. On June 4, 1957, this Court of Appeals reversed the Circuit Court of the City of St. Louis (R. 186).

The St. Louis Court of Appeals in its opinion first stated that the Federal Employers' Liability Act removed common law defenses and stated that any negligence of the employer, however slight, is sufficient to make a submissible case (R. 192). However, the Court added:

> "The act does not enlarge upon the conception of the negligent acts or the omission that we have heretofore considered essential to a recovery and we therefore have no logical guide except the common law." (R. 192, Appendix C, p. A12).

The Court further proceeded to cite the common law rule as it exists in Missouri and stated that the master is not bound to furnish the newest and best, but only has to furnish tools of ordinary character and of reasonable safety and further stated that:

> "There was no evidence that the gun was not of the type in common usage and that such usage was that which ordinary prudent persons would employ under similar circumstances."

The Court also stated that:

> "The fact that work was being done under the car presented no unusual situation since the car had been elevated to a height for work underneath. The petitioner's evidence sifted down to its real substance is that the employee preferred a different tool which he considered less dangerous" (R. 194-195, App. C, p. A15).

The Court summed the matter up by stating that there was no evidence upon which the employer could be held negligent.

A motion for a re-hearing, or in the alternative to transfer cause to the Supreme Court of Missouri was filed on June 19, 1957 (R. 197).

This motion was overruled by the St. Louis Court of Appeals on July 1, 1957 and petitioner's application to transfer cause to the Supreme Court of Missouri was filed on July 25, 1957 (R. 220) and said application to transfer was denied by the Supreme Court of Missouri on September 9, 1957 (R. 263, App. B, p. A6).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The St. Louis Court of Appeals erred in holding that there was not sufficient evidence to take to the jury the question whether the respondent was negligent in failing to furnish the petitioner with a reasonably safe tool with which to do the work petitioner was required to do.

The Federal Employers' Liability Act* provides that an employee is entitled to recover for injuries resulting in whole or in part, from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, works, boats, wharfs, or other equipment.

In a recent interpretation by this Court in the case of *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500, 77 S.Ct. 443, 1 L. Ed. 2d 493, there was pointed out that this statute was enacted because Congress was dissatisfied with the

*(35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1404, 45 U.S.C., Section 51, *et seq.*, 45 U.S.C.A., Section 51, *et seq.*)

common law duty of the master to his servant and that the statute supplants that duty with the far more drastic duty of paying for death or injuries at work due in whole or in part, to the employer's negligence.

The Court further states that:

> *"The employer is stripped of his common law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."* (Emphasis supplied).

Despite the consistent holdings of this Court reiterating the principles set forth in the above-cited case, the St. Louis Court of Appeals in the instant case ignored the law as set down in these decisions and reverted to the practice of the common law doctrine of determining whether or not the employer was negligent and ignored the decision interpreting the Federal Employers' Liability Act.

The St. Louis Court of Appeals in its opinion first stated, and admitted, that the Federal Employers' Liability Act removed common law defenses and that any negligence of the employer, however slight, is sufficient to make a submissible case. However, the Court added:

> "The act does not enlarge upon the conception of the negligent acts or the omission that we have heretofore considered essential to a recovery and we therefore have no logical guide except the common law" (R. 192, App. C, p. A12).

The Court then proceeded to cite the common law rule as it exists in Missouri and held that the master is not bound to furnish the newest and best, but only has to furnish tools of ordinary character and of reasonable safety and ignoring petitioner's evidence in its entirety stated that:

> "There was no evidence that the gun was not of the type in common usage and that such usage was that which ordinary prudent persons would employ in such usage."

The evidence clearly showed that until shortly prior to the incident in question the respondent had furnished its employees at the shop where petitioner worked with rivet guns that had inside triggers. This gun was described as "the trigger is on the inside of the handle where you couldn't accidentally hit it against something when you would move it." The day before petitioner was injured a replacement gun was furnished by respondent This gun had an outside trigger that was not protected and which could very easily be discharged. This gun was described by fellow employees as "unsafe" (R. 19-29). These guns operated under ninety pounds of air-pressure. The first time petitioner used the gun with the unprotected trigger was the day before he was injured and he used the gun at that time only after being directed to do so. At the time of his injury petitioner was working underneath a boxcar that had been jacked up three or four feet. When he was getting ready to move he must have accidentally brushed his apron against the trigger and it went off, causing the snap on the end of the gun to fly out and petitioner sustained bodily injury by being struck by this snap. The jury observed both guns. The respondent introduced evidence that the gun with the outside trigger was in common usage (R. 142).

In holding that the petitioner did not sustain his burden of making a submissible case for the jury under the evidence set forth, the St. Louis Court of Appeals not only disregarded the decisions of this Court under the Federal Employers' Liability Act, but also disregarded previous decisions of the Missouri Supreme Court in this respect.

This Court has very recently ruled on a similar question as presented in the instant case in the case of *Ferguson* v. *Moore-McCormick Lines, Inc.*, 352 U.S. 521, 77 S. Ct. 457 (1956), 1 L. Ed. 2d 511, which was a case under the Jones Act, 41 Stat. 10007, 46 U.S.C., Sec. 688, 46 U.S.C.A., Sec. 688, which imposes the same standard of liability as that established under the Federal Employers' Liability Act. In that case petitioner was furnished with a sharp butcher knife to chip hard ice cream and he received his injuries while using this butcher knife. The evidence showed that the hard ice cream could have been loosened safely with an ice chipper. This Court in holding that the case should have been submitted to the jury held that:

> *"Fair-minded men could conclude that respondent shoud have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him."* (Emphasis supplied).

In the instant case, fair-minded men could have, and did, conclude that the respondent should have furnished petitioner with a rivet gun wherein the trigger mechanism was protected, for doing the type of work he was required to do. This case originally submitted to a jury in the City of St. Louis resulted in a unanimous verdict in the sum of $11,500.00. The jury had an opportunity to see both of the rivet guns and to hear evidence concerning the use of both types of rivet guns.

The St. Louis Court of Appeals by its decision completely usurped the right of the jury by holding that there was no negligence shown against the respondent. Because a Federal Employers' Liability Act case whose facts were identical could not be cited to this Court, the Court apparently took the attitude that it must revert to the common law for its decision. In doing this, it disregarded the cases of this Court cited above.

The respondent's viewpoint that the type of rivet gun furnished to petitioner is in common usage in industry in railroads generally also does not shield the respondent from liability if such rivet gun is not a reasonably safe appliance. This identical question was presented in the case of *Urie* v. *Thompson*, (357 Mo. 731, 210 S.W.2d 98), wherein the Missouri Supreme Court, ruled as a matter of law, that since the railroad had adhered to customary standards of the trade no submissible case was made; however, the Supreme Court of the United States reversed the ruling of the Missouri Supreme Court (*Urie* v. *Thompson*, 337 U.S 163, 69 S.Ct. 1018, 93 L.Ed. 1282) and in its decision held that prevalent standards of conduct do not constitute a defense when such conduct is inadequate to protect railroad employees.

In this case the Court clearly set forth the applicable law which could not be misinterpreted by any other Appellate Court for there the court stated:

> *"What constitutes negligence for the statutes purposes is a federal question, not varying in accordance with the different conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs.* * * *" (Emphasis supplied).

(*Urie* v. *Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 1027, 93 L.Ed. 1282). The court also in holding that the maintenance of

trade standards does not negative negligence stated (*Urie* v. *Thompson, Supra,* 69 S.Ct., l.c. 1028):

> *"but we also reject the premises, for we think that negligence, within the meaning of the Federal Employers' Liability Act, except if respondent knew, or, by the exercise of due care should have known, that prevalent standards of conduct were inadequate to protect the petitioner and similarly situated employees".* (Emphasis supplied).

Even prior to the *Urie* case this Court had stated "what usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not". (*Texas & Pacific R. R. Co.* v. *Behymer*, 189 U.S. 469, 470, 23 S.Ct. 622, 47 L.Ed. 905, 906).

The present opinion shows conclusively that the Appellate Courts of Missouri have again failed to follow the teaching of this Court. *Gibson* v. *Guy A. Thompson, Trustee, New Orleans, Texas & Mexico Railway Co.*, 54 U.S. ....., 78 S.Ct. 2, 26 Law Week 3128; *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493; *Webb* v. *Illinois Central R. Co.*, 352 U.S. 512, 77 S.Ct. 451, 1 L.Ed.2d 503; *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 77 S.Ct. 457, 1 L.Ed.2d 511; *Shaw* v. *Atlantic Coast Line R. Co.*, 353 U.S. 920, 77 S.Ct. 680, 1 L.Ed.2d 718; *Futrelle* v. *Atlantic Coast Line R. Co.*, 353 U.S. 920, 77 S.Ct. 682, 1 L.Ed. 2d 718; *Deen* v. *Gulf, C. & S. F. Ry. Co.*, 353 U.S. 925, 77 S.Ct. 715, 1 L.Ed.2d 721; *Thomson* v. *Texas & Pacific Ry. Co.*, 353 U.S. 926, 77 S.Ct. 698, 1 L.Ed.2d 722; *Arnold* v. *Panhandle & S. F. Ry. Co.*, 353 U.S. 360. 77 S.Ct. 840, 1 L.Ed. 889; *Ringhiser* v. *Chesapeake & O. Ry. Co.*, 354 U.S. 901, 77 S.Ct. 1093, 1 L.Ed.2d 1268; *Urie* v. *Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 1028, 93 L.Ed. 1282; *Lavender* v. *Kurn*, 327 U.S. 645, 66 S.Ct. 740.

A similar situation to the instant case was presented in *Pittsburgh C. C. & L. R. Co.* v. *Cole*, 6th Cir., 260 Fed. 357, where judgment in favor of plaintiff was affirmed in the case where the railroad supplied plaintiff with a pneumatic hammer without a safety spring, and plaintiff was injured as a result thereof. The negligence submitted in that case was that of furnishing a pneumatic hammer for plaintiff to use when said pneumatic hammer was not equipped with a safety spring.

We respectfully submit that the St. Louis Court of Appeals erred in directing a verdict for the respondent. *Gibson* v. *Guy A. Thompson, Trustee, New Orleans, Texas & Mexico Railway Co.*, 54 U.S. ....., 78 S.Ct. 2, 26 Law Week 3128; *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493; *Webb* v. *Illinois Central R. Co.*, 352 U.S. 512, 77 S.Ct. 451, 1 L.Ed.2d 503; *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 77 S.Ct. 457, 1 L.Ed.2d 511; *Shaw* v. *Atlantic Coast Line R. Co.*, 353 U.S. 920, 77 S.Ct. 680, 1 L.Ed. 2d 718; *Futrelle* v. *Atlantic Coast Line R. Co.*, 353 U.S. 920, 77 S.Ct. 682, 1 L.Ed.2d 718; *Deen* v. *Gulf, C. & S. F. Ry. Co.*, 353 U.S. 925, 77 S.Ct. 715, 1 L.Ed.2d 721; *Thomson* v. *Texas & Pacific Ry. Co.*, 353 U.S. 926, 77 S.Ct. 698, 1 L.Ed.2d 722; *Arnold* v. *Panhandle & S. F. Ry. Co.*, 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed. 889; *Ringhiser* v. *Chesapeake & O. Ry. Co.*, 354 U.S. 901, 77 S.Ct. 1093, 1 L.Ed.2d 1268; *Urie* v. *Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 1028, 93 L.Ed. 1282; *Lavender* v. *Kurn*, 327 U.S. 645, 66 S.Ct. 740.

II.

The St. Louis Court of Appeals usurped the province of the jury in accepting as true respondent's version of the evidence and disregarding petitioner's evidence.

In its decision the St. Louis Court of Appeals stated:

> "There was no evidence that the gun was not of the type in common usage and that such usage was

> that which ordinary prudent persons would employ under similar circumstances * * *. The gun would not go off without pressure upon the trigger. The fact that work was being done under the car presented no unusual situation since the car had been elevated to a height sufficient for the work underneath." (R. 194, 195) (App. C, pp. A14-A15).

In thus adopting the foregoing statement, the St. Louis Court of Appeals completely disregarded the type of work the petitioner was required to do when he was using the rivet gun. Petitioner's evidence showed that he had three or four feet under the body bolster of the box car under which he was working to move and the riveting work he was doing required him to hold the rivet gun up above his head approximately six inches to one foot (R. 49-55). The rivet gun with the unprotected trigger did not have a trigger safety on it or anything to keep the gun from going off when it was not in use (R. 43). Common experience will tell us that a man who is required to work underneath a boxcar which is elevated three or four feet does not have sufficient room in which to stand and is necessarily incumbered when he must travel from one portion of the car to the other. The evidence showed that when he moved from one side of the car to the other there was no way in which the air pressure from the rivet gun could be turned off and there was nothing that would prevent the employee from accidentally brushing the trigger and discharging the gun (R. 34). The end result is that the petitioner was required to move in and about underneath cars carrying with him a heavy rivet gun under ninety lbs. air pressure (R. 16, 17) with no protection of any kind to keep the gun from discharging. The type of rivet gun furnished petitioner with the trigger on the outside may be a safe piece of equipment under certain circumstances and conditions where the person using such gun is not required to crawl

around underneath cars with three or four feet clearance, yet the St. Louis Court of Appeals completely disregarded this evidence and stated emphatically that:

> "No unusual situation was presented since the car had been elevated." (R. 195) (App. C, p. A15).

The St. Louis Court of Appeals further completely accepted the respondent's version of the evidence that the type of rivet gun with the trigger on the outside was generally preferred in industry. Petitioner's evidence was to the effect that petitioner and his fellow employees had never used this type of rivet gun at any time before except the day before petitioner's injury (R. 13, 18, 39). This was substantial evidence to the effect that the gun was not in common usage and certainly was not in common usage in the respondent's shops in North Kansas City, Missouri. The St. Louis Court of Appeals by accepting the fact that the gun was in common usage once again invaded the province of the jury by acting as a jury in weighing the evidence in determining that respondent's evidence was true and yet the jury may well have disregarded and had a right to disbelieve the evidence submitted by the respondent in respect to the common usage of the rivet gun with the unprotected trigger.

As clearly shown by its opinion, the St. Louis Court of Appeals has invaded the province of the jury in violation of the mandate of this Court.

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences, * * *. It is the jury, not the court, which is the fact-finding body. * * *. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reason-

able. * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable". *Tennant* v. *Peoria & Pekin Union R. Co.*, (1944) 321 U.S. 29, l. c. 35, 64 S.Ct. 409, 88 L.Ed. 520, l.c. 525.

CONCLUSION.

The St. Louis Court of Appeals in reversing the judgment of the jury has invaded the province of the jury and its opinion conclusively shows that it has failed to follow the teachings of this court. Since the Supreme Court of the State of Missouri refused to review this decision, it has placed its stamp of approval on such conduct. Certiorari should be granted in this instance "to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Rogers* v. *Missouri Pacific R. R. Co.*, (352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493).

Respectfully submitted,

CHARLES E. GRAY,
Suite 701—721 Olive Street,
St. Louis 1, Missouri,
CHestnut 1-5620,
TERRY, JONES & WELTON,
210 Rialto Building,
Kansas City, Missouri,
Attorneys for Plaintiff.

APPENDIX A.

Federal Employers' Liability Act, 53 Statutes 1404-1414, 45 U.S.C., Sections 51-60, inclusive.

Section 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be con-

sidered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

Section 52. Carriers in Territories or other possessions of United States.

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Apr. 22, 1908, c. 149, Sec. 2, 35 Stat. 65.

Section 53. Contributory negligence; diminution of damages.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who

may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908. c. 149, Sec. 3, 35 Stat. 66.

Section 54. Assumption of risks of employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

Section 55. Contract, rule, regulation, or device exempting from liability; set-off.

Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. Apr. 22, 1908, c. 149, Sec. 5, 35 Stat. 66.

Section 56. Actions; limitations; concurrent jurisdiction of courts.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, Sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, Sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, Sec. 18, 62 Stat. 989.

Section 57. Who included in term "common carrier."

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier. Apr. 22, 1908, c. 149, Sec. 7, 35 Stat. 66.

Section 58. Duty or liability of common carriers and rights of employees under other acts not impaired.

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress. Apr. 22, 1908, c. 149, Sec. 8, 35 Stat. 66.

Section 59. Survival of right of action of person injured.

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal repre-

entative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury. Apr. 22, 1908, c. 149, Sec. 9, as added Apr. 5, 1910, c. 143, Sec. 2, 36 Stat. 291.

Section 60. Penalty for suppression of voluntary information incident to accidents; separability clause.

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby. Apr. 22, 1908, c. 149, Sec. 10, as added Aug. 11, 1939, c. 685, Sec. 3, 53 Stat. 1404.

APPENDIX B.

The order of the Missouri Supreme Court denying respondent's petition to transfer cause in the Supreme Court of Missouri in the April Session, 1957, entered on the ninth day of September, 1957, is shown herewith:

IN THE SUPREME COURT OF MISSOURI.

April Session, 1957.

Roy Honeycutt,
Respondent,
vs.
Wabash Railroad Company, a Corporation,
Appellant.
46495.

Transfer.

Now at this day, on consideration of respondent's Application to transfer the above entitled cause from the St. Louis Court of Appeals, it is ordered that said application be, and the same is hereby denied.

State of Missouri—Sct.

I, Marion Spicer, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the April Session thereof, 1957, and on the 9th day of September, 1957, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 25th day of September, 1957.

Marion Spicer,
Clerk.

(Seal)

Deputy Clerk.

APPENDIX C.

The order of the St. Louis Court of Appeals, April Session, 1957, entered on June 4, 1957, reversing the judgment of the Circuit Court of the City of St. Louis, is printed herein together with the opinion of the said St. Louis Court of Appeals:

APRIL SESSION, 1957.

TUESDAY, JUNE 4, 1957.

Roy Honeycutt,
Respondent,
vs. Circuit Court No. 83863-D, Div. No. 14.
Wabash Railroad Company, a Corporation,
Appellant.
No. 29695.

Now again come the parties aforesaid, by their respective attorneys, and the Court, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said Circuit Court of the City of St. Louis be reversed, annulled and for naught held and esteemed; that the said appellant be restored to all things it has lost by reason of the said judgment; and that said appellant recover of said respondent the costs of this appeal, namely:

Docket fee in Appellate Court	$ 10.00
Cost of preparing transcript on appeal	106.80
Total Appellate Court Costs	$116.80

It is ordered that said costs be taxed in said Circuit Court of the City of St. Louis in favor of appellant, for which

execution may issue out of said Circuit Court. Opinion concurred in by E. M. Ruddy, Presiding Judge, M. C. Matthes, Judge, and Lyon Anderson, Judge, filed.

IN THE ST. LOUIS COURT OF APPEALS

APRIL SESSION, 1957

ROY HONEYCUTT,
(Plaintiff) Respondent,

vs.

WABASH RAILROAD COMPANY,
a Corporation,
(Defendant) Appellant.

No. 29,695
Appeal from Circuit Court City of St. Louis
Hon. James E. McLaughlin, Judge
Opinion Filed June 4, 1957

This is an action by an employee of the defendant company to recover damages arising out of an injury that he sustained in the course of his employment. It was brought under the Federal Employers' Liability Act, 45 U.S.C.A., § 51 *et seq.*, and resulted in a verdict for the plaintiff in the sum of $11,500. A remittitur was ordered and the plaintiff did remit $7,000. From the resulting judgment for $4,500 the defendant prosecutes this appeal.

It was alleged in the plaintiff's petition that he had been employed for some time as a car man in the yards of the defendant. It was further alleged that on November 10, 1954, plaintiff was working underneath a car with a rivet gun, and that while moving about under the car the gun suddenly discharged a metal clip which struck the plaintiff, lacerating his forehead. It was averred that "defendant negligently failed to furnish and provide plaintiff with a reasonably safe place to work and reasonably safe tools to work with in that defendant provided a rivet gun with an unprotected trigger when, in the exercise of ordinary care, defendant knew, or should have known, that in

the use of said equipment in the performance of his duty, plaintiff was likely to be injured."

The allegations of negligence were denied by the defendant's answer and the issues thus presented were tried upon the following evidence.

The plaintiff was a man thirty-five years of age and had worked in the defendant's car repair department for about seven years. During about four years of that time he had been using pneumatic rivet guns in the course of his work. There were two types of guns. The operational parts are enclosed in a cylinder about three inches in diameter. In the front end of this cylinder is a plunger which is a short cylindrical shaft. On the end of the plunger is a snap, the striking part of the tool, which hits the rivet. On the back end of the gun is a large grip, shaped like a pistol grip, and a trigger. Attached to the cylinder is an air hose, the other end of which is attached to an air compressor. The air pressure maintained is about ninety pounds.

When in operation the gun is held with the left hand grasping the cylinder and the right hand holding the grip. Thus holding the gun the snap is pressed against the end of a rivet and, by the trigger, compressed air from the hose connected to the gun is released into the mechanism which causes the plunger to vibrate and to pound the snap against the rivet. Upon releasing the trigger the gun stops. The two types of guns are alike in all respects except that the trigger on one is towards the top and on the outside of the grip. It is operated by pressing with the right thumb while the grip is held by the four fingers of the right hand. The other gun has the trigger between the cylinder and the grip and to activate the gun it is squeezed in the manner of a pistol trigger. Both guns will discharge the plunger and the snap into the air if the gun is triggered without

holding the snap against a rivet or something to prevent it from flying out.

The plaintiff with a crew, consisting of himself and two others, was engaged in riveting plates on the bottom of a freight car which was jacked up so that he had a vertical space of about four feet in which to work. He sat on a nail keg during the operation and the plates that he riveted were about six inches or a foot above his head. The other two members of the crew were in the car above him. One of them heated the rivets and placed each heated rivet in a hole in the plates and frame. The other held a bucking pail against the head of the rivet and the plaintiff then applied the rivet gun from below to flatten the bottom head upon it.

The plaintiff testified that the day before he was injured he went to the office where the guns were kept and that there were two guns there. One had the trigger on the inside of the grip and the other had the trigger on the outside. He started to get the gun with the trigger on the inside and told the foreman that he preferred it, but he was directed to take the other gun. He worked that day with the gun having the outside trigger. The next day he had the same gun and after the crew had finished riveting one part of the car he prepared to move to another place. He was seated on the nail keg and preparing to move when he reached down and picked up the gun. It went off. The snap and plunger came out and struck the car. The snap glanced back and struck the plaintiff's forehead. He said that he wore at the time a canvas apron and that as he reached for the gun the trigger probably brushed against the apron and caused it to eject against the plunger and snap.

One of the crew, testifying on behalf of the plaintiff, said that he had used the gun in question and that it was

"kind of quick" and that he told the foreman it was "trigger happy". He said that acording to his best recollection they had always had two rivet guns with the triggers on the inside before they received the gun in question.

Another workman testified by deposition that in working under a car there was a reasonable likelihood that a gun with the trigger on the outside would discharge the plunger and snap. This could only occur if the trigger was bumped against something or accidentally pushed. He said that you would not accidentally hit the trigger when it was located on the inside of the handle of the gun. He also stated that some time prior to the accident they had only guns with the inside triggers.

On behalf of the defendant the foreman testified that they had always had one of each type of guns and that the one with the trigger on the inside was out of repair at the time of the accident. He said that he had done riveting for many years and preferred the gun with the outside trigger as it afforded better control. This was by reason of the fact that one did not need to relax his hold on the grip to press the trigger as was the case with the inside trigger.

A manager for Ingersoll-Rand Company, which manufactured both guns, testified that both types were widely sold. It was a matter of preference. He said that the operator wore heavy gloves and that in picking up the guns with the inside trigger he was apt to take the trigger with the grip and cause it to accidentally discharge. Both guns sold for the same price and the one with the outside trigger was preferred by a ratio of about two to one.

The foregoing constituted the pertinent testimony as it related to liability and the case was presented to the jury upon the theory that the defendant could be found

negligent if it furnished plaintiff with a rivet gun with an unguarded trigger and that such a gun was not a reasonably safe piece of equipment for the work in which the plaintiff was engaged. The defendant maintains that the evidence was insufficient to support a verdict and that the court erred in overruling its motion for a directed verdict. The plaintiff conversely contends that there was sufficient evidence that the gun with the unprotected trigger was not as safe as a gun with a protected trigger and that this was a sufficient basis upon which to predicate negligence.

45 U.S.C.A., § 51, provides that a carrier shall be liable for damages to any persons suffering injury or death "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." It will be seen that the act does not enlarge upon the conception of the negligent acts or omissions that we have heretofore considered essential to a recovery, and we therefore have no logical guide except the common law. *Dow* v. *Carnegie-Illinois Steel Corp.*, 3 Cir., 165 F2d 777; *Watkins* v. *Thompson*, D.C., 72 F.Supp. 953; *Whitaker* v. *Terminal Railroad Ass'n of St. Louis*, Mo.App., 224 S.W.2d 606. The act does remove common-law defenses that were previously available and any negligence of the employer, however slight, contributing to the injury is sufficient to make a submissible case. *Rogers* v. *Missouri Pacific R. Co.*, 77 S.Ct. 443; *Herdman* v. *Pennsylvania Railroad Co.*, 77 S.Ct. 455. But it is nevertheless true that there must be evidence of some negligence. *Herdman* v. *Pennsylvania Railroad Co.*, 77 St.Ct. 455.

In support of his stand that a submissible case was made, plaintiff cites us to *Cleghorn* v. *Terminal Railroad Ass'n*, Mo., 289 S.W.2d 13; *Urie* v. *Thompson*, 337 U.S. 163; *Carver* v. *Missouri-Kansas-Texas R. Co.*, 362 Mo. 897, 245 S.W.2d 96; *Stone* v. *New York, C. & St. L. R. Co.*, 344 U.S. 407; *Grosvener* v. *New York Central Railroad Co.*, 343 Mo. 611, 123 S.W.2d 173; *Bolan* v. *Lehigh Valley R. Co.*, 2 Cir., 167 F.2d 934; *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Cole*, 6 Cir., 260 Fed. 357. The charges of negligence in these cases are as follows: *Cleghorn* v. *Terminal Railroad Association* deals with the negligent failure to illuminate a switch stand in a dark railroad yard. In *Urie* v. *Thompson* the charge was the use of a faultily adjusted sanding device. *Carver* v. *Missouri-Kansas-Texas R. Co.*, had to do with an unsecured bridge brace. In *Stone* v *New York, C. & St. L. Railroad Co.*, the plaintiff was directed to pull a tie beyond his capacity when a safe and accepted procedure was available. *Grosvener* v. *New York Central Railroad Co.*, was predicated upon a failure to warn. *Bolan* v. *Lehigh Valley Railroad Co.*, dealt with a defective step. All of these relate to acts or omissions which are commonly recognized as sufficient to make a submissible case under the Federal Employers' Liability Act.

The last case, *Pittsburgh, C., C. & St. L. Railway Co. v. Cole*, had to do with a pneumatic hammer or gun similar, we assume, in some respects to the tool involved in this case. The difference is that the type used had a safety spring that could be attached to prevent the hammer from flying out when air was admitted. The charge of negligence was a failure on the part of the employer to supply plaintiff with a safety spring. There was evidence that such springs were available and that it would have held the hammer in place. This also is a recognizable act of negligence but the facts differ from the case before us in

that here the tool furnished was a complete tool and there was no evidence that it could be guarded or made more safe. The case was presented and tried upon the theory that another tool of a different design would have been less hazardous.

The common-law rule as we have known and pronounced it in Missouri is that the master "is not bound to furnish the newest and best. He performs his duty when he furnishes those of ordinary character and of reasonable safety. Absolute safety is unobtainable and, we repeat, employers are not insurers." *Fischer* v. *City of Cape Girardeau*, 345 Mo. 122, 131 S.W.2d 521, l.c. 525. This view expressed finds sanction in *McGivern* v. *Northern Pacific Ry. Co.*, 8 Cir., 132 F.2d 213, l.c. 218, wherein the court held: "The employer is not required to furnish the newest or even the safest and most approved devices if the employee is not deceived as to the degree of danger to which he is subjected."

There are several quite obvious reasons for this rule, one of which was stated in *Canadian Northern Railway Co.* v. *Walker*, 8 Cir., 172 Fed. 346, l.c. 352, in which the court said: "Skilled and experienced railroad operators are more competent than jurors or judges to choose methods of operating railroads, and when a railroad company, as in this case, has selected and adopted a customary method of loading and unloading its cars and of removing temporary obstructions necessarily used in that work, which is neither palpably unreasonable nor clearly dangerous, it owes its servants no duty to adopt a different method, and it cannot be held guilty of negligence because it has not done so."

There was no charge that the gun was defective. There was no evidence that the gun was not of the type

in common usage and that such usage was that which ordinary prudent persons would employ under similar circumstances. Nor was there any evidence that the outside trigger could have been guarded. The gun would not go off without pressure upon the trigger. The fact that work was being done under the car presented no unusual situation since the car had been elevated to a height sufficient for the work underneath.

The plaintiff's evidence sifted down to its real substance is that the employee preferred a different tool which he considered less dangerous. If this was sufficient then the employer could be held liable for the next man hurt at riveting with a tool of the other type if that man happened to consider it the more dangerous of the two tools.

It appears therefore that there was no evidence upon which the employer could be held negligent, and it is the recommendation of your Commissioner that the judgment be reversed.

John J. Wolfe,
Commissioner.

Per Curiam:

The foregoing opinion of Wolfe, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly reversed.

E. M. Ruddy, Presiding Judge, concurs.

M. C. Matthes, Judge, concurs.

Lyon Anderson, Judge, concurs.